SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

JOHN M. WHEELER and
WILLIAM T. HOWES
vs.
THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY.

No. 534.

Motion to Dismiss or Affirm Writ of Error.

Comes the defendant in error in this cause and moves the Honorable Court to dismiss the writ of error herein, as this Court has no jurisdiction thereof; or to affirm the judgment, it being manifest that even if the Court has jurisdiction the the question on which the jurisdiction depends is so frivolous as not to need further argument.

WM. D. BISHOP, JR.,
Attorney for Defendant in Error.

To Robert E. DeForest, Attorney of Record for Plaintiffs in Error in the above entitled case.

You are hereby notified that the defendant in error in the above named cause will, on Monday, the 14th day of May, A. D. 1900, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion and the brief thereon hereto attached.

WM. D. BISHOP, JR.,
Attorney for Defendant in Error.

STATEMENT.

Nature of this Action.

This writ of error is taken to a judgment of the Connecticut Court upon an application by the defendant in error under a certain Special Act hereinafter set out at length (Brief, p. 3,) and under section 3461 of the General Statutes of Connecticut, Revision of 1887 (Brief, p. 10), for the appointment of appraisers to estimate the damages that may arise to the plaintiffs in error from the taking and occupation by the defendant in error, of their real estate.

The laws of Connecticut do not permit the occupation by said railroad company of said real estate until such damages shall have been appraised and paid. General Statutes of Connecticut, Revision of 1887, section 3464.

History of the Special Act.

When the General Assembly of the State of Connecticut convened at its Session of 1895, its attention was directed to the fact that The New York, New Haven & Hartford Railroad Company had, under the exigencies of its business, four-tracked its railroad and eliminated all grade crossings from New York to New Haven, except in that section which lies in the City of Bridgeport, and extends through the entire length of the city, a distance of more than four miles, and crosses, at grade, twenty-four streets, some of them the most frequented in the whole city. The completion of the four-tracking between New York and New Haven awaited the adoption of some plan by which these grade crossings could be avoided. The State would not permit the danger of these crossings to be increased by the additional tracks at grade. The city, for its own welfare, was not willing that such increase of danger

should be allowed, and the railroad shared in the same unwillingness. (Mooney v. Clark et al., 69 Conn. p. 255.)

The General Assembly at its said session passed a Special Act entitled a "Resolution Providing for the Abolition of Grade Crossings in Bridgeport." The Act is as follows:

"PROVIDING FOR THE ABOLITION OF GRADE CROSSINGS IN BRIDGEPORT.

Resolved by this Assembly: Section 1. That in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven and Hartford Railroad Company, in the City of Bridgeport, shall be abolished in the manner hereinafter prescribed.

Sec. 2. Said city and said railroad company may, within six months after the passage of this resolution, agree upon the manner, plans, methods, and time in which said crossings at grade shall be abolished, and upon all other matters mentioned in section six of this resolution, and what amount, or proportion, or what items of the cost thereof, including a reasonable allowance for the services and expenses of the mayor, and William E. Seeley, and Frederick S. Stevens, shall be paid by the city of Bridgeport. For the purpose of making said agreement, the mayor of the city, and William E. Seeley, and Frederick S. Stevens, of said city, are hereby empowered to act for said city, and such agreement shall be final and conclusive upon all parties concerned when approved by the board of railroad commissioners of this state, and shall then be deemed to be an order of said board and enforcible in the manner provided in section seven of this resolution.

Sec. 3. If it shall be agreed as aforesaid that any highway crossing or crossings of said railroad tracks shall be abolished by carrying the same over or under said tracks, and the grade of said highway or of any highway connecting therewith at or near said crossing is to be thereby changed, and that said city shall pay the special damages resulting to property owners from such change of grade, either or both of the parties to such an agreement shall certify that fact to the clerk of said city, and it shall thereupon be the duty of the board of appraisal of benefits and damages of said city to estimate and appraise to the owners of land abutting on the raised or lowered portion of said highway the special damages resulting to them therefrom, over and above any special benefit resulting to them from the abolition of such grade crossing and such change of grade, and to estimate and appraise to the owners of any land

situated in said city any special benefits accruing to them from the abolition of said grade crossing and said change of grade; provided, that the whole amount of benefits so assessed for said particular abolition and change of grade shall not exceed the whole amount assessed to the owners of said abutting land for said change of grade; and provided, further, that no benefits or damages for said change of grade shall be assessed to or against said railroad company. And all the provisions of the charter of said city relative to the mode of assessing benefits and damages for the lay out of streets by the common council and to appeals therefrom, and relative also to the payment of the same and to filing liens therefor and the effect of the same, are incorporated and made a part of this section, and made applicable to assessments made under this section.

Sec. 4. If, however, the agreement hereinbefore provided shall not have been made, then and in that event the board of railroad commissioners are hereby authorized and directed to determine the plans, fix the time, and order the methods by which said crossings shall be abolished.

Sec. 5. Said commissioners, upon written application to them therefor, by said city or said railroad company, are hereby empowered and directed to determine the manner, plans, method, and time in which said work shall be done and such crossings at grade be abolished. Before making such determination, said commissioners shall hold a public session in the city of Bridgeport for the purpose of hearing said city and said railroad company, and any other persons interested, relative to the manner, plans, method, and time in which such work shall be done and said crossings at grade be abolished, and shall give such notice as they shall adjudge reasonable of the time, place and purpose of said session, to said city and said railroad company and other persons, by publication in two daily newspapers published in said city.

Sec. 6. Said commissioners shall determine upon the manner, plans, method, and time in which such work shall be done and said crossings at grade be abolished, and are empowered and directed to determine and order from time to time what changes shall be made in the manner in which the tracks of said railroad shall be carried through said city, what highways or private ways shall be carried over or under the tracks of said railroad, what highways or private ways, and what parts thereof, shall be discontinued or closed, and what, if any, new highways shall be laid out; and to determine within what time and in what manner said changes shall be made. Said commissioners are authorized and directed to require said rail-

road company to make such changes in the grade, alignment, radii of curves, and location of the tracks of said company, and to make such changes in the grade, lines, and width of any street or highway within said city, whether now crossing said tracks at grade or otherwise, as said commissioners shall judge necessary and proper for the purposes of this resolution; and they shall have power to authorize and require said railroad company to construct a new drawbridge across the navigable waters of Bridgeport harbor in the line of the existing drawbridge or near the same, and between it and the lower bridge, so called, and to determine the place where the draw in said bridge shall be constructed, and the plan of the same, and said bridge shall be free of the obligations imposed by section 3503 of the general statutes. And said commissioners are also authorized and directed to make all orders in relation to said changes and to any and all matters and things appertaining thereto, including the temporary use, occupation, or closing of any street in said city, and including the number of tracks to be constructed by said railroad company, which they may deem necessary and proper for the due execution of the purposes of this resolution. And the said commissioners are also authorized and directed to order any water, gas, telegraph, telephone, electric light or power company, or street railway company, to change the location in the manner designated by the commissioners at its own expense, of its pipes, wires, poles or tracks; also to make suitable orders as to the relocation of any public or private sewer or drain pipe.

Sec. 7. After the manner, plans, methods, and time in which said work shall be done shall have been determined upon, it shall be the duty of said commissioners to cause the same to be executed, and for that purpose they may apply to the superior court for Fairfield County for writs of mandamus or for proper process either in law or equity, and said court shall have full power to grant the necessary and proper relief. And it shall be the duty of said railroad company, under the directions of said commissioners, to do all the work of excavation, construction, alteration, and grading of said tracks, streets, approaches, bridges, and abutments required in doing said work.

Sec. 8. Said railroad company and said city may jointly and severally take any land or any interest therein which they shall deem necessary properly to carry out said work in any and all particulars, as called for in said plans so determined upon, in the same manner as is now provided by statute for taking land for railroad purposes. But, whenever any land is so taken for

highway purposes, the appraisers so appointed shall, in estimating the damages to the owner or owners thereof, take into account any special benefits resulting to them from the layout of any new highway or highways, alteration in the width, line or location of any existing highway or highways, or the discontinuance of any existing highway or highways, or parts thereof, in doing said work, and only the excess of the damages, if any, over said benefits shall be awarded to such owner or owners for such taking of land.

Sec. 9. In order to facilitate the completion of said work, whenever any damages shall be awarded to any person for taking his land for highway purposes, and it shall be necessary to pay for the same before said land is entered upon and taken, it shall be the duty of said railroad company to pay the sums so awarded, and if the amount thereof is to be reimbursed to said company by said city under the provisions of this resolution, the same may be collected, with interest, from said city by said railroad company in the same manner and to the same extent that debts lawfully contracted by municipal corporations in this state are enforced.

Sec. 10. The common council of the city of Bridgeport is hereby authorized, under the corporate name and seal and upon the credit of said city, to issue bonds or other certificates of debt, and the same or the avails thereof, when sold as hereinafter authorized, may be appropriated by said common council for the purpose of paying the expense imposed upon said city by this resolution, but for no other purpose whatsoever; and said bonds may be issued in such sums and on such time and at such rate of interest, not exceeding five percentum per annum, payable semi-annually, and shall be prepared, signed, and authenticated in such manner and form, with coupons or otherwise, as said common council may determine, and the same may be sold from time to time under the direction of the mayor and the board of aldermen of said city; and said bonds or certificates when issued as aforesaid shall be obligatory upon the said city of Bridgeport to all intents and purposes, and may be enforced and collected in the same manner and to the same extent that debts lawfully contracted by municipal corporations in this state are enforced.

Sec. 11. Said city shall provide a sinking fund for the payment of the principal of the bonds or certificates hereinbefore authorized, and in each municipal year during which any of said bonds shall be outstanding, the board of apportionment and taxation of said city shall appropriate a reasonable and suitable sum for the purpose of said sinking fund, which, with

the accumulations thereon, shall be sufficient to pay said bonds or certificates at their maturity, and said sinking fund shall be in the care and under the direction of the board of sinking fund commissioners of said city; and said fund shall be securely invested by said board for the sole purpose of redeeming all of said bonds or certificates issued by this authority at their maturity.

Sec. 12. Whenever said work shall have been done and said crossings at grade shall have been abolished, said commissioners shall direct what proportion of the entire expense, including land damages, together with their expenses and clerk hire, shall be paid by the said railroad company, by the city of Bridgeport, and by the state of Connecticut, in such proportions as the commission may deem equitable, and when such payments shall be made.

Sec. 13. The decision of said board of commissioners upon all questions of the plans or methods of abolishing said grade crossings shall be final and conclusive upon all parties concerned, but any party aggrieved by any order of the commissioners concerning the apportionment of expense may appeal to the superior court for the county of Fairfield, within thirty days after such order has been passed, giving notice to the adverse parties in accordance with the provisions of section 3518 of the general statutes, and the comptroller is directed to act in behalf of the state in reference to such apportionment.

Sec. 14. After said work shall have been done and said crossings at grade shall have been abolished as provided for in this resolution, the common council of said city may direct that an amount, not exceeding one-half of the whole expense of the city therefor, be assessed upon the persons or corporations other than said railroad company whose property is specially benefited or improved thereby in proportion to such benefits; and the board of appraisal of benefits and damages of said city shall proceed to assess the same, and the provisions of the charter of said city relative to the mode of assessing benefits for the construction of sewers within said city and to appeals therefrom, and to the payment thereof, and to filing liens therefor, are incorporated into and made a part of this section and made applicable to the assessments provided for in this section.

Sec. 15. Said city is hereby authorized to purchase and said New York, New Haven and Hartford Railroad Company is hereby authorized to sell to said city the present railroad

bridge across the Bridgeport harbor, with the approaches to said bridge on either side thereof, if said city and said railroad company shall agree upon the price and terms of sale.

Approved June 22, 1895."

Special Acts and Resolutions Passed by the General Assembly of the State of Connecticut at the January Session, 1895.

Action thereunder and Subsequent Litigation.

On December 21, 1895, said railroad company and the persons designated in said Special Act to act on behalf of the City of Bridgeport, entered into an agreement, under the provisions of said Act, which was approved on January 23, 1896, by the Railroad Commissioners of the State of Connecticut, as required by the provisions of said Special Act. This agreement (Record, pp. 11, 12, 13, 14), provides the manner, plans, method and time in which the grade crossings shall be abolished, and upon all other matters mentioned in Section 5 of said Special Act, and the proportion of the cost thereof to be borne by the City of Bridgeport and the Railroad Company. The proportion of such cost to be paid by the city being one-sixth, and the proportion to be paid by the Railroad Company being five-sixths; provided, that the total cost to be paid by the city shall not exceed in the aggregate the sum of $400,000.

On April 27, 1896, one Frank J. Mooney, a citizen and taxpayer of the City of Bridgeport, brought an action in equity in the Superior Court of Connecticut, for the purpose of testing the constitutionality of said Special Act. The Superior Court declared the Act constitutional and this decision was, on appeal, affirmed by the Supreme Court of Errors of Connecticut, on May 25, 1897. (Mooney v. Clark et al., 69 Conn. 241.)

No further action was taken by the plaintiff in that case.

Since the rendition of the final judgment in the Mooney v. Clark case, the plaintiffs in error have been continuously resist-

ing in the Connecticut courts the taking of their land for the purpose of carrying said Special Act into effect.

(Wheeler et al. v. N. Y. N. H. & H. R. R. Co., 70 Conn. 326; Same v. Same, 71 Conn. 270; N. Y. N. H. & H. R. R. Co. v. Wheeler et al., 72 Conn., not yet published, being the same case upon which this writ of error is founded.)

It thus appears that by litigation of one sort or another the work of abolishing grade crossings in Bridgeport has been prevented during the entire period that has elapsed from April 27, 1896, down to the present. This condition must continue until the present writ of error shall have been disposed of. The natural increase in the population of the city and the concurrent increase in the number and speed of trains enhances the danger caused by the continued existence of these grade crossings. These suggestions are not made for the purpose of convincing the Court that these motions, or either of them should be granted, but rather with the hope that the Court will give the motions as early a consideration as a proper regard for the existing conditions may seem to require.

BRIEF.

I.

As to Motion to Dismiss.

This motion is based upon the claim of the defendant in error that this Court has no jurisdiction of this writ of error, inasmuch as no constitutional question was passed upon by the Supreme Court of Errors of Connecticut, nor does the record properly present any constitutional question for the consideration of this Court.

Statutory Authority for the Taking of the Land of the Plaintiffs in Error.

1. Section 8, of the Special Act hereinbefore set out (Brief, p. 5), provides, that "said railroad company and said city may jointly and severally take any land or any interest therein which they shall deem necessary properly to carry out said work" (i. e. the work of abolishing grade crossings) "in any and all particulars, as called for in said plans so determined upon, in the same manner as is now provided by statute for taking land for railroad purposes."

2. The statute which provides for the manner in which land may be taken for railroad purposes is Section 3461 of the General Statutes of Connecticut, Revision of 1887, and reads as follows:

"Every railroad company, after its line of road shall have been located, approved and established, may so far alter the location of such road as to change the radius of its curves, straighten and improve its lines, width, and extent of depot grounds, slopes and embankments, and extend its lines of sight, when such changes are approved by the Railroad Commissioners, and may take lands for additional tracks, turnouts, and freight and passenger stations and depots."

Action taken preliminary to Application for the Appointment of Appraisers.

Said railroad company having deemed it necessary to take the land of the plaintiffs in error properly to carry out the word of abolishing said grade crossings, "as called for in said plans so determined upon," brought its application to the Railroad Commissioners under the authority of said Special Act and said Section 3461, for their approval of the taking of said land by said railroad company; and said Railroad Commissioners after due notice to the plaintiffs in error, and after due hearing had, made their order and finding approving the

taking by said railroad company of said land. (Record, paragraphs 5 and 8, on pp. 9 and 10, and Judgment on pp. 21, 22.) The plaintiffs in error appealed from this determination of the Railroad Commissioners (thus superseding their order) to the Superior Court of the State of Connecticut (being the highest *nisi prius* court in the State) and failing to secure a favorable result in that court, they appealed (thus superseding the action of the Superior Court) to the Supreme Court of Errors of Connecticut, in which the action of the Superior Court was sustained, and the right of said railroad company to take said land became fixed. Wheeler et al. vs. N. Y. N. H. & H. R. R. Co., 71 Conn. 270.

The plaintiffs in error brought no writ of error to this Court to the judgment in the case last above cited.

History of this Application.

Said railroad company being unable to obtain said land by agreement with the plaintiffs in error, brought its application to a judge of the Superior Court of Connecticut for the appointment of appraisers under the provisions and by authority of Section 3464 of the General Statutes of Connecticut, Revision of 1887. Said section provides, "When any railroad company shall have the right to take real estate for railroad purposes, and cannot obtain it by agreement with the parties interested therein, it may apply to any judge of the Superior Court for the appointment of appraisers to estimate all damages that may arise to any person from the taking and occupation of such real estate for railroad purposes," etc. Judge Ralph Wheeler, of said Superior Court, granted said application and appointed appraisers. (Record, Judgment, pp. 21, 22.) The plaintiffs in error appealed from the decision of Judge Wheeler to the Supreme Court of Errors of Connecticut, thus superseding the same. Said Supreme Court sustained Judge Wheeler (N. Y. N. H. & H. R. R. Co. v. Wheeler et al., 72 Conn.) and the plaintiffs in error have

taken the present writ of error to that judgment, and have taken the steps necessary to have said writ operate as a *supersedeas*.

The Supreme Court of Errors Considered no Federal Question Involved.

It will be observed from an inspection of the opinion of the Supreme Court of Errors in the present case that no constitutional question was passed upon by that Court. (Record pp. 36–42.)

The Record Discloses None.

Claim of Plaintiffs in Error.

It will be observed from an inspection of the record presented to this Court that the plaintiffs in error claim the right to question the constitutionality of said Special Act 'though they appear before it in no other capacity than as *owners of the land sought to be taken.* In that exclusive capacity they claim the right to say that their property is sought to be taken without due process of law, because the *City of Bridgeport* will be required to pay the railroad company on account of expenditures not germane to the work of eliminating the grade crossings.

1. *The liability of the City is in no way fixed by this application.*

It by no means appears that the city will be called on to pay one dollar on account of any such expenditures, or, if called upon, that it will be required to pay.

2. *These plaintiffs in error do not appear as Taxpayers or as Representatives in any way of the City of Bridgeport.*

But, however that may be, the plaintiffs in error are not before this Court as taxpayers of the city. They have not alleged that they have any right or authority to represent the city or its taxpayers, or that they will be injured in any respect on account of the payment by the city of its part of the expense as fixed by the agreement, and the order of the Railroad Commissioners approving the same. They do not allege, either, that the use for which their land is sought to be taken is other than a public use. Their only claim is, and they make it *simply as owners of the land*, that the railroad company has no right to take their land for an *admittedly public use* because the Special Act contravenes the 25th Amendment to the Constitution of the State of Connecticut, and of Section 1 of Article XIV, of the Amendments to the Constitution of the United States, in that by the terms of the agreement entered into under authority of said act, the city of Bridgeport will be required to reimburse the railroad company on account of expenditures not germane to the work of eliminating grade crossings.

3. The right of the Railroad to take the land, even under the Special Act, in no way depends upon the provision that the Railroad may recover compensation from the City.

Referring again to the opinion of the Supreme Court of Connecticut, we find this language,—"But the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property, does not depend upon the obligation of the city to pay a one-sixth part of the expense of the whole, or of any portion of the work of this undertaking.

The two purposes of the act of 1895 were, first, the removal of all existing grade crossings in Bridgeport and the construction, in the most feasible manner, after considering the interest of the public, the rights, responsibilities and duties of

the railroad company, and of the city, and the rights of other parties concerned, of a four-track railroad through the city in such a way as to avoid crossing any highway at grade, and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depends upon a previous apportionment of the expense between the parties who should bear it. Section 12 as we have already said provides that if no agreement shall have been made as authorized by section 2, the commissioners after the work shall have been completed, shall apportion the entire expense among the proper parties."

This citation expresses precisely the claim of the defendant in error in the premises and would seem to be conclusive of the question of the right of the plaintiffs in error to invoke the jurisdiction of this Court.

4. The right of the Railroad to take this land is perfect under the General Statute.

Thus far the discussion has been confined to the Special Act. But if we assume, for the sake of argument, that this Court can properly take jurisdiction of the constitutionality of that act, it by no means follows that this motion should be concluded thereby. In this connection we beg to call the attention of the Court to the following extract from the opinion of the Supreme Court of Connecticut,—

"We may add that the right of the railroad company to condemn the defendants' property does not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897,

both of which are alleged in this application, the railroad company is entitled under section 3461 of the General Statutes to take the land for the uses named in the resolution."

The plaintiffs in error have not and cannot now question the constitutionality of said section 3461, (Brief, p. 10). The constitutional claims made by them apply solely to the Special Act and have not the slightest application to the general law referred to, a recourse to which, of course, has the effect that the entire expense of acquiring land for railroad purposes must be borne by the railroad company which acquires it, and by no stretch of the imagination can the City of Bridgeport be called upon to pay any portion thereof.

II.

As to the Motion to Affirm.

If this Court shall determine that it has jurisdiction of this writ of error, we desire to urge emphatically that it is manifest that the writ is taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

Surely, it may properly be said here, as was said by this Court in the case of the New York and New England Railroad Co. vs. Bristol, 151 U. S. 566, that, "The jurisdiction may be said to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm."

WM. D. BISHOP, JR.,
Counsel for Defendant in Error.

A true copy of the foregoing motion to dismiss or affirm, the notice thereof, and the briefs in support thereof on behalf of the defendant in error, was this day delivered to me by W. D. Bishop, Jr., Esq., Counsel for the Defendant in Error.

Dated at Bridgeport, Connecticut, April 23, 1900. A. D.

ROBERT E. DEFOREST,
Counsel for the Plaintiffs in Error.